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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY LEMONT MCCOLLOM,

Defendant and Appellant.

D055907

(Super. Ct. No. FSB040103)

APPEAL from a judgment of the Superior Court of San Bernardino County, Bryan F. Foster, Judge. Affirmed.

Anthony McCollom appeals from a judgment convicting him of first degree murder. He asserts the trial court erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter. We reject his contention of reversible error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On June 29, 2003, McCollom killed his former girlfriend, Julie Baumgardner, by repeatedly hitting her on the head with a maul (a tool used to split wood). The killing occurred at the home where McCollom was staying, while Baumgardner was meeting with McCollom during her lunch break from work. Baumgardner informed her sister and a friend that she was going to meet with McCollom, and she stated to the friend that McCollom told her not to let anyone know they were going to meet. After committing the killing in the dining room of the home, McCollom moved Baumgardner's body through various locations in the home, and ultimately deposited it, along with the maul and a bag of bloody clothes and rags, under a bed. The police were alerted after Baumgardner did not return to work from her lunch break, and Baumgardner's body was later discovered under the bed.

When questioned by the police, McCollom initially claimed three white men arrived at the residence while Baumgardner was there. The men called her a "'nigger lover'" and killed her; the men then told him to dispose of her body and not tell the authorities.

At trial, McCollom testified on his own behalf and admitted the killing. The dispute at trial concerned his state of mind during the killing. The prosecution contended he committed first degree murder based on premeditation and deliberation, whereas the defense contended that he committed only involuntary manslaughter. The trial court instructed the jury on involuntary manslaughter but refused the defense request for instructions on voluntary manslaughter.

To resolve McCollom's contention of instructional error, we focus on the evidence presented by the defense to determine if there was sufficient evidence to support a finding of voluntary manslaughter and thus to require instruction on this theory. We conclude the evidence did not warrant the instruction. Alternatively, the record shows any error in failing to instruct on voluntary manslaughter was harmless.

Defense Evidence

Testifying on his own behalf, McCollom described the events leading up to the homicide. McCollom and Baumgardner were in a romantic relationship from about November or December 2002 until March 2003. McCollom had been using methamphetamine and over time his use increased. Baumgardner ended the relationship because she had "some issues" about him not having a job and she "might have been catching onto" his methamphetamine habit. They continued to talk on the phone about two or three times a week after their relationship ended, which upset the people they knew because the people "were put in the middle of these scrimmages." When they broke up, McCollom retained Baumgardner's Game Boy video game system and she had some of his jerseys and CD's. Unbeknownst to Baumgardner, McCollom sold the Game Boy system to buy methamphetamine.

Sometime after June 11, 2003, McCollom left his father's home to stay with his children and mother at his mother's boyfriend's home. As a condition of his staying there, his mother required that he not have any contact with Baumgardner because his mother did not want to be "in the middle of [their] arguments."

During this time period, McCollom continued to use methamphetamine on a daily basis. The night before the homicide, he had been up all night smoking methamphetamine. On the morning of June 29, he made a "spur of the moment" call to Baumgardner at her job. He wanted to see her, and he used the excuse that they should meet to return each other's property, including her Game Boy. He still wanted to be in a relationship with her, and she had told him this was possible if he "cleaned up [his] act" and got a job. He told her during the phone call that he had "made some progress toward what she had wanted."

Baumgardner agreed to meet with him at his residence during her 30-minute lunch break, on the condition that he not tell anyone they were meeting. After speaking with her on the phone, McCollom smoked more methamphetamine.

McCollom was concerned that his children (who were home with him) might tell his mother that he had seen Baumgardner, so he told them to go into a bedroom before she arrived. When Baumgardner arrived, he sat down next to her at the dining room table. Initially during the conversation, he was able to steer her away from talking about the Game Boy. He told her that he was doing better and he was working for his father and earning steady money. He asked about her love life, inquiring if she was "seeing anybody," and she told him no. They talked about how they were still attracted to each other, and discussed the logistics of "probably [having sex] real quick" "right then and there." This made McCollom feel good; he thought no one noticed that he was "high"; she would not ask about her Game Boy; and they would have sex and she would go back to work.

However, Baumgardner stopped the conversation and asked about her Game Boy, stating, "[W]ell, what about the Game Boy? Why don't you go get my stuff . . ."; "before we go let me get that Game Boy." McCollom knew that he did not have the Game Boy; it upset him that she still wanted her things back; and he wondered "why is she bringing this up now." Because of the way he was acting about the Game Boy, they started arguing. Baumgardner stated she was seeing someone from work; "the difference between [McCollom] and him was that he had a job and [McCollom] didn't"; McCollom was "a piece of crap" and would not "amount to anything"; and she did not know "what she was thinking even considering doing anything." Their argument did not reach the point of "yelling," but she ordered him to "go in the room and get [her] stuff."

McCollom felt very angry and upset. He wanted to get away from her and smoke methamphetamine. He got up from the table and went into a back bedroom as if he was going to get her property. Instead, he smoked more methamphetamine, which "set [him] off" even more. He testified that he had expected to get back together with her and to have sex with her, and he felt that she was playing games with him. First, they had been talking civilly to each other and she told him she was not seeing anyone and talked about having sex with him. Then, the conversation suddenly changed "just because [he] didn't have the Game Boy or [was] stalling to go get it or whatever she felt." She admitted she was seeing someone and that she was not going to stop seeing him, and she indicated McCollom "would never be on that person's level" and he would "continue to be an object of contempt to her." His thoughts of getting back together with her were "knocked

out from underneath" him and it seemed as if she was "enjoying it." He thought she was "lead[ing] [him] on" and it "was just a buildup and a let down."

McCollom walked out of the back bedroom and picked up a maul that was inside next to a door by the deck. He walked up to Baumgardner and attacked her from behind as she was sitting in the dining room chair. He was very angry and upset at her for the way she was treating him and in a "very emotional state." He lost control and repeatedly hit her. He did not remember what he was thinking as he hit her, how many times he hit her, or how she reacted.

McCollom testified that the verbal exchange with Baumgardner made him "angrier than [he] should have been." He stated that if he had not been smoking methamphetamine continuously he did not think he would have "gotten that emotional." He had not planned and did not want to kill Baumgardner, pointing out that she was on her lunch break, it was the middle of the day, and his children were at the house.

Defense experts testified concerning the effects of chronic methamphetamine use and methamphetamine intoxication, including violent irrational behavior, rage, paranoia, and psychosis. The defense experts opined that McCollom was under the influence of methamphetamine at the time of the killing.

Jury's Verdict

The trial court instructed the jury on first degree murder based on premeditation and deliberation, and the lesser included offenses of second degree murder and involuntary manslaughter.

To support a theory of premeditated first degree murder, the prosecutor argued to the jury that McCollom (upset because Baumgardner had a new boyfriend) lured her to his mother's home using the Game Boy return as a pretext; told her not to tell anyone she was coming; instructed his children to stay in the bedroom; brought the maul into the house to have it ready; and then retrieved the maul and approached Baumgardner from behind to kill her in a surprise attack.

To refute the murder charges, defense counsel argued to the jury that McCollom was guilty only of involuntary manslaughter because there was no evidence of planning and his chronic methamphetamine use and methamphetamine intoxication caused him to engage in a "senseless act of rage" that negated the mental state for murder.

The jury found McCollom guilty of first degree murder, with a finding that he personally used a deadly or dangerous weapon. McCollom admitted a prior conviction that qualified as a serious felony and strike prior conviction. He was sentenced to an indeterminate term of 50 years to life and a determinate term of six years.

DISCUSSION

To support his request for instructions on voluntary manslaughter, McCollom contended there was sufficient evidence for the jury to find that the victim provoked him by first discussing the possibility of having sex with him and leading him to believe they might reestablish their relationship, and then changing the conversation and making demeaning and belittling statements about him. He asserted the victim set in motion a rage reaction in him, which was then increased when he separated himself and smoked more methamphetamine.

Declining his request, the trial court reasoned the evidence did not show the conversation was a "heated exchange," and that although McCollom may have taken offense to the victim's statements, the statements would not have caused a reasonable person to lose control. The court noted there was no "actuating cause" that immediately shocked the defendant (such as when a husband walks into a room and finds his wife in bed with someone else), and assessed that a "passion that is simmered for a significant period of time" does not show a heat of passion reaction. Further, the court observed that McCollom's reaction to the victim's statements was not instantaneous but instead involved time to reflect when he went into the other room and smoked methamphetamine, and the defense theory that methamphetamine had "a role" in the killing reflected that it was the defendant's mental defects that precipitated the killing.

To evaluate McCollom's claim that the jury should have been instructed on voluntary manslaughter, we first summarize the relevant legal principles, including the law pertaining to the gradations of homicide culpability.

Governing Law

First degree murder is an unlawful killing with malice aforethought, premeditation, and deliberation. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) Malice may be express (intent to kill) or implied (intentional commission of life-threatening act with conscious disregard for life). (*Ibid.*) Second degree murder is an unlawful killing with malice, but without the elements of premeditation and deliberation. (*Ibid.*) To reduce a murder to second degree murder, premeditation and deliberation may be negated

by such factors as intoxication or heat of passion from provocation. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306; see *People v. Hughes* (2002) 27 Cal.4th 287, 341.)

If the provocation would not cause an average person to react in the heat of passion, but it precluded the defendant from subjectively deliberating and premeditating, the crime is second degree murder. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296; *People v. Padilla* (2002) 103 Cal.App.4th 675, 678.) If the provocation would cause a reasonable person to react in the heat of passion, the defendant is deemed to have acted without malice so as to further reduce the crime to voluntary manslaughter, even though the killing was intentional or with conscious disregard for life. (*People v. Lasko* (2000) 23 Cal.4th 101, 108; *People v. Rios* (2000) 23 Cal.4th 450, 466-467.) Finally, an unlawful homicide without intent to kill and without conscious disregard for life is involuntary manslaughter. (*People v. Rios, supra*, 23 Cal.4th at p. 466; *People v. Turk* (2008) 164 Cal.App.4th 1361, 1370-1377.)

Voluntary manslaughter instructions are warranted only when the evidence can support the existence of the limited, explicitly defined circumstances that provide for partial exculpation notwithstanding the defendant's intent to kill or conscious disregard for life. (See *People v. Moya* (2009) 47 Cal.4th 537, 549.) To support voluntary manslaughter, the provocation that incites the defendant to homicidal conduct in the heat of passion must be caused by the victim or by conduct reasonably believed to have been engaged in by the victim. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583.) "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to

act rashly or without due deliberation and reflection.'" (*Id.* at pp. 583-584.) "'Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.'"' (*Id.* at p. 584.) Because the existence of malice is presumed when the circumstances of a killing suggest an intent to kill or conscious disregard for life, the provocation and heat of passion must be affirmatively demonstrated. (*People v. Dixon* (1995) 32 Cal.App.4th 1547, 1552.)

The heat of passion requirement has both an objective and subjective component. (*People v. Manriquez, supra*, 37 Cal.4th at p. 584.) The defendant "must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation." (*People v. Moye, supra*, 47 Cal.4th at p. 550.) Further, the provocative conduct "'must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment.'" (*People v. Manriquez, supra*, 37 Cal.4th at pp. 585-586.)

The assailant must act under the smart of the sudden quarrel or heat of passion; that is, the violence must occur suddenly in response to the provocation, and not belatedly as revenge or punishment. (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1244-1245.) If sufficient time has elapsed between the provocation and the killing for the passions of an ordinarily reasonable person to cool and reason to return, the killing is murder, not voluntary manslaughter. (*People v. Moye, supra*, 47 Cal.4th at p. 550; *People v. Kanawyer, supra*, at p. 1244.)

A trial court must instruct on a lesser included offense when there is evidence from which the jury could conclude that the lesser offense, but not the greater, was committed. (*People v. Manriquez, supra*, 37 Cal.4th at p. 584.) The duty to instruct is not triggered by the existence of any evidence, no matter how weak, in support of the lesser offense; rather, the evidence must be substantial enough to merit consideration by the jury. (*People v. Moye, supra*, 47 Cal.4th at p. 553.)

In deciding whether the evidence warrants instruction on a lesser included offense, the trial court should not evaluate the credibility of witnesses and should resolve doubts in favor of giving the instruction. (*People v. Manriquez, supra*, 37 Cal.4th at p. 585; *People v. Strozier* (1993) 20 Cal.App.4th 55, 63.) On appeal we independently determine whether a lesser included offense instruction should have been given. (*People v. Manriquez, supra*, 37 Cal.4th at p. 584.)

Analysis

Based on McCollom's testimony, the jury was presented with evidence indicating that shortly before the killing, McCollom and Baumgardner discussed the possibility of having sex together, which raised McCollom's hopes that their relationship would resume. McCollom, who had promised to return her Game Boy and knew he could not do so, tried to steer the conversation away from the Game Boy. When Baumgardner brought up the subject of her Game Boy, the tone of their conversation changed once Baumgardner observed his reaction. McCollom described Baumgardner as believing that he "didn't have the Game Boy or was stalling to go get it." Baumgardner then commenced to berate McCollom, stating she was involved with someone else who,

unlike McCollom, had a job; saying McCollom was a "piece of crap" who would not amount to anything; and indicating she would not resume her relationship with him.

These are not facts that show provocation by the victim sufficient to cause an average person to act rashly rather than from reason and judgment. Baumgardner altered the tone of the conversation after she saw McCollom's reaction to her request for her Game Boy, apparently because she suspected that he may have misled her about returning the Game Boy. There was nothing in her verbal statements that was so shocking that it might have caused a reasonable person to lose control under heat of passion. Their relationship had been over for several months; thus, it was not provocative for McCollom to discover she had a new boyfriend. McCollom already knew that she did not want to be with him as long as he did not measure up to her standards, and her verbal insults merely reiterated this same theme. As recognized by the trial court, this was not a case akin to those where a defendant loses control under circumstances involving a spouse's infidelity. (Compare *People v. Le* (2007) 158 Cal.App.4th 516, 518-522, 527-529 [duty to instruct on voluntary manslaughter based on accumulated provocation from wife's affair followed by verbal insults on day of killing] with *People v. Gutierrez* (2009) 45 Cal.4th 789, 826-827 [no duty to instruct on voluntary manslaughter based merely on tussle and cursing between defendant and defendant's ex-girlfriend].)

Moreover, McCollom did not instantaneously attack Baumgardner after she insulted him, but rather left the room, smoked more methamphetamine, picked up the maul, and returned to the dining room. McCollom acknowledged in his trial testimony that if not for his methamphetamine use, he would not have reacted as emotionally as he

did. McCollom essentially conceded that Baumgardner's statements would not have inflamed an ordinary, *sober* person to the point of losing reasoning capacities.

Alternatively, even assuming the trial court should have instructed on voluntary manslaughter, the error was harmless under any standard of review given the jury's first degree murder verdict. (See *People v. Rogers* (2006) 39 Cal.4th 826, 867-868, 871-872 [reasonable probability of a different outcome standard normally applies to erroneous refusal to instruct on lesser included offense; however, harmless beyond a reasonable doubt standard applies if defendant was deprived of right to present complete defense].) The jury was instructed that the defendant could not be guilty of first degree murder based on premeditation and deliberation if the "decision to kill [was] made rashly, impulsively, or without careful consideration" (See CALCRIM No. 521.) From this instruction, the jury knew that if the killing resulted from a passionate, emotional response rather than reason or judgment, McCollom could, at most, be guilty of only second degree murder. Further, the theory that McCollom reacted from passionate emotion rather than reason was presented at length to the jury when defense counsel argued in support of involuntary manslaughter, asserting that because of McCollom's methamphetamine use he reacted "in a senseless . . . rage" to the conversation with the victim. Defense counsel pointed out that, according to the defendant, he wanted to reestablish his romantic relationship with the victim and they initially started talking about having sex that day, when the tone of the conversation suddenly changed, causing the defendant to become angry. Defense counsel asserted that McCollom "snapped" and

"had little or no recollection of what happened" and that this was consistent with a person being under the influence of methamphetamine to the point of psychosis.

Thus, the jury knew that a rage response was relevant to the level of McCollom's culpability, and that if it concluded he acted in an unthinking rage it had to reject the allegation of premeditation and deliberation and could not find him guilty of an offense greater than second degree murder. The jury found him guilty of first degree murder based on premeditation and deliberation, which shows that, notwithstanding evidence showing his anger from the conversation with the victim and his methamphetamine use, the jury found he acted with reflection and careful consideration. (See *People v. Carasi*, *supra*, 44 Cal.4th at p. 1306 [a cold, calculated judgment showing premeditation and deliberation may be arrived at quickly].) A state of mind showing premeditation and deliberation is "'manifestly inconsistent with having acted under the heat of passion—even if that state of mind was achieved after a considerable period of provocatory conduct.'" (*Ibid.*)

Because the jury's first degree murder verdict reflects its finding that McCollum acted with premeditation and deliberation rather than rashly or impulsively, the jury would not have found he acted in a heat of passion even if it had been instructed on voluntary manslaughter. (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 586.)

DISPOSITION

The judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

MCDONALD, J.

IRION, J.